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In the Supreme Court of the United States

OCTOBER TERM, 1960

NOLLIE GARNETT COPE, FRANK STOKES DAVIS, ROBERT LEE DOWELL, GRADY LEE ESTEP, EDWARD EUGENE KENNEDY AND WILLIAM HOWARD MCDOWELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered June 6, 1960. The petition for a writ of certiorari

was filed July 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners had a fair trial.

STATEMENT

The petitioners were convicted in the United States District Court for the Middle District of North Carolina of conspiracy to violate the liquor laws.[1] The indictment charged that the conspiracy occurred "in July, 1958, and on other dates prior thereto" and continued until the return of the indictment.

1. The evidence may be summarized as follows:

Petitioners Cope (who lived in Winston Salem, North Carolina), McDowell (who lived in High Point, North Carolina), and Davis (who lived in Myrtle Beach, South Carolina) were shown to have been in telephone communication with each other from March through August, 1958 (Tr. 37-51, 53-58).

Early in August, 1958, petitioner McDowell ordered from a company in High Point two pressure tanks with metal racks which were observed loaded on a tractor-trailer after McDowell had paid for them (Tr. 135-139). The trailer truck, driven by petitioner Estep, was followed to Myrtle Beach, South Carolina,

[1] The petitioners were sentenced as follows: Cope and Davis—4 years' imprisonment and $10,000 fine; Dowell—5 years; Estep—3 years and $1,000 fine; Kennedy—18 months and $1,000 fine; McDowell—15 months (Tr. 530-533).

but was lost sight of in the neighborhood known as Collins Creek at about 3:00 a.m. on August 7. It was observed later on August 7 in Conway, South Carolina, and was followed to Virginia where, on inspection, the trailer was found to be empty (Tr. 91-94, 96-97, 110-111, 135-139, 148-159, 232-237).

Observation in the neighborhood of Collins Creek on August 12 revealed that a distillery was being set up (Tr. 160-165). Surveillance was maintained on the site and the Davis home from then to September 5. The distillery was observed in operation from August 24 to September 5. The petitioners concede that all of them except Mr. McDowell were identified as being at the distillery at various times (See Tr. 174-186, 303-308, 359-366, 382-384, 394-396).

Mr. Cope was shown to have purchased 900 cases of half gallon jars at North Carolina on August 22, 1958 and to have had them transported to South Carolina in the tractor-trailer previously observed (Tr. 68-71, 99-100). Over objection it was shown that Mr. Cope had made a purchase of 950 cases of jars from the same company on April 18, 1958 (Tr. 65-67).

The still was raided early in the morning of September 5, 1958. Petitioner Dowell and two co-defendants were arrested at the scene (Tr. 307-308, 397, 413). Tanks similar to those ordered by Mr. McDowell were found to be part of the distillery (Tr. 131-132, 311).

Petitioners Estep and Kennedy were arrested in North Carolina while driving the tractor-trailer.

More than 2,000 gallons of non-tax-paid whiskey were seized (Tr. 101-102, 191-193, 288). Petitioners Cope and Davis were arrested without a warrant late in the morning of September 5 (Tr. 195).

2. Before trial on October 5, 1959, the petitioners made a motion to suppress evidence seized from Cope and Davis at the time of their arrest. When the motion came up for hearing before trial on October 12, the United States Attorney called the attention of the court to the fact that those petitioners had made a similar motion in the Eastern District of South Carolina, where they had been arrested, and that the district court there had, on October 7, 1959, found the arrest invalid and ordered that any evidence procured incident thereto be suppressed (Tr. 14-15). The district court in the present case pointed out that the petitioners had made no motion based on the South Carolina order and said that he would not consider the matter until it was properly presented to the court and could be appropriately argued (Tr. 23-27). When counsel was asked whether he would proceed on the basis of his motion to suppress before the court or on the South Carolina order, counsel stated that he would stand on the South Carolina order (Tr. 32). He withdrew the motion to suppress then before the court (Tr. 34). The court, however, made it clear that there was no final decision, and that it would hear the matter at the proper time, if objection was made to evidence (Tr. 32-33).

The government did not introduce any evidence obtained from Cope and Davis at the time of their arrest. There was evidence, to which petitioners ob-

jected, that at the time of his arrest Davis was wearing a Tyrolean pointed type straw hat (Tr. 195-196) and there was other evidence that a man in the same type of hat (whom the observing officer identified as Davis) was seen at the still (Tr. 395-396). There was other direct identification of Davis as being at the distillery (Tr. 175, 360) as well as considerable other evidence connecting him with the conspiracy.

ARGUMENT

The petitioners' contention that they did not have a fair trial is wholly without merit. In the face of overwhelming evidence of guilt, the petitioners have culled the record for alleged errors, most of which are not errors at all and none of which have any significance.

1. The indictment charged that the conspiracy occurred in July, 1958, and at times prior thereto and continued until the return of the indictment. There was evidence that some of the petitioners had been in touch with each other from March on. Under these circumstances, the fact that Mr. Cope bought in April glass jars of the same type which later were shown to have been bought in North Carolina (in August) for use in South Carolina was properly admissible for whatever bearing it might have on the intent of the conspirators. And even if the admission of this one item were error, it was clearly harmless.

2. The court properly permitted evidence as to statements by one conspirator to go in against all,

subject to a motion to strike if the testimony were found not to have established a conspiracy. Since proof must come in piecemeal, in any conspiracy case a judge must in his discretion either allow testimony to be received only against the party making the statement and then admit it against all, or allow it in generally, subject to a motion to strike. Here the evidence as to telephone communications among three of the main defendants had already come in before any statement by one was offered (R. 76), so that the judge had reason to believe that a conspiracy would be shown. And, in the end, there was sufficient proof to permit the evidence to be used against all.

3. During the examination of a government witness, the bottle in which a sample of the liquor taken from the truck was sent to the government chemist was identified (Tr. 409-410). Petitioners' counsel called attention to the fact that there was "prejudicial" writing on the bottle (Tr. 410-411) (i.e. a label marked POISON). The government called the chemist who testified that such a label was put on all samples as a routine matter (Tr. 420-421). The judge instructed the jury that there was no contention that the bottle contained a poisonous substance and that the label had absolutely nothing to do with the case (Tr. 420-421). The bottle was not offered or received in evidence. There is thus no validity to the claim of prejudice.

4. The government proved its case by calling numerous agents who worked together and whose testimony duplicated each other. Under these circum-

stances; it is a measure of the lack of error in the record that the petitioners try to find prejudice (Pet. 10) in the judge's remark, just before a noon recess, which in effect asked whether the testimony of the 24th government witness was not cumulative (Tr. 118). Similarly without basis is the suggestion (Pet. 10-11) that there was error in the remarks of the United States Attorney when, in answer to arguments of defense counsel that the numerous officers who testified could not be believed (Tr. 140-145), he said that if the the jury was not going to believe the officers, whom were they to believe (Tr. 145); and later, after reviewing the charge and the evidence (Tr. 145-149), that the defendants had not offered "any evidence to ask you to believe anybody" and that, if the jury believed the officers had lied, they should acquit (Tr. 149). A reference to the fact that nothing served to contradict the testimony of the officers was not a comment on the defendant's failure to take the stand.

5. There was no occasion for the judge to pass on the binding effect of the South Carolina order of suppression since no evidence taken at the time of the arrest was offered in evidence. Testimony as to the kind of hat petitioner Davis was seen to have been wearing before he was arrested does not stem from the arrest (see the Statement, *supra*, pp. 4-5).

6. The petitioners did not object to the charge of the court (Tr. 490). Their present attempt to rely upon alleged errors in the statement of the evidence on its face relates to minor matters (see Pet. 11-13) and in any event comes too late (Rule 30, F. R.

Crim. P.), particularly since the judge instructed the jury that it was their recollection which was to govern.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JULY 1960.